October 5, 1994

MEMORANDUM

Civil Justice Bills of Interest to the Industry

For the past several years, the industry has followed products liability and comparative responsibility bills, as well as bills on several additional topics, some of which are not immediately recognizable as of interest to the industry. This memorandum briefly describes each of these topics.

Tobacco Manufacturer/Health Care Liability

In recent years, bills have been introduced in several states that would impose special rules of liability on companies that manufacture and sell cigarettes and other tobacco products. These proposals have taken many forms. Some bills are specifically targeted at tobacco companies and would, for example, create a "presumption" that tobacco products "cause" cancer and other diseases. Other proposals would require tobacco companies to pay the costs of treating lung cancer patients at state charity hospitals or would hold tobacco product manufacturers absolutely liable for any alleged harm caused by their products.

Recently, Florida enacted legislation that permits the state to file lawsuits against manufacturers (not just those who make tobacco products) to recover Medicaid costs incurred by the State in treating those whose injuries were caused by these companies. In such a lawsuit, the new Florida law provides that all affirmative defenses are eliminated, joint and several liability (which has otherwise been abolished in Florida) may be imposed, the state may pursue class actions without following the usual procedural requirements for class action litigation, causation and damages may be proven by statistical evidence, and through the imposition of market-share liability, damages may be awarded without proof that a particular manufacturer's product was used by the injured party.

Any such proposals to impose special rules of liability on tobacco companies or to provide the state with a cause of action to recover Medicaid or health care costs is of great interest to the industry.

Products Liability

Products liability bills contain one or more rules governing the liability of manufacturers for injuries associated with the use of products, e.g., that a product is "defective" if the product is more dangerous than an ordinary consumer would expect. Some bills provide defenses to specific classes of defendants, e.g., retailers and wholesalers, or in specific fact situations, e.g., when the product conformed to the most advanced technology available at the time the product was manufactured.

2046641191

Source: https://www.industrydocuments.ucsf.edu/docs/qybk0000

Most bills contain one or two provisions; in a few states, bills have addressed a comprehensive list of products liability issues. Any bill that contains a provision addressing products liability, no matter what the bill is titled, is of interest to the industry.

In 1993, products liability bills were enacted in Mississippi, Texas and North Dakota; none were enacted in 1994.

Comparative Responsibility

There are many variations among states in the ways that a plaintiff's fault affects the liability of a manufacturer for injuries associated with the use of a product. These doctrines may provide a defense to liability or may reduce the portion of plaintiff's damages for which a defendant is liable.

The doctrines include contributory negligence, in which any degree of negligence by the plaintiff is a complete defense to liability (recognized in four states and the District of Columbia); assumption of risk, in which a plaintiff who voluntarily encounters a known risk cannot hold a manufacturer liable (recognized in a number of states); and comparative negligence, in which the plaintiff's fault reduces the portion of the plaintiff's damages for which the defendant is liable (adopted by statute or court decision in many states).

Provisions affecting these doctrines are often included in bills that deal with joint and several liability. Bills that would amend the rules governing the effect of a finding of plaintiff's fault on either liability or damages are of interest to the industry.

Bills to unfavorably amend comparative responsibility laws were considered in several states in 1994; none were enacted. In 1993, Arizona and North Dakota codified the assumption of risk doctrine.

Statutes of Limitation and Repose

Statutes of limitation specify the time within which a plaintiff must file a lawsuit. The time limit is usually 2 or 3 years; the crucial issue is usually when the statutory period begins. In many states, the statutory period begins when the plaintiff discovers, or reasonably should have discovered, both the injury and its cause. In a few states, the statutory period begins when the act causing the injury occurred; even though the injury might not be discoverable for several years.

Bills may seek to change the length of the statute of limitations; the classes of lawsuits to which a specific time period applies; or the time when the statutory period begins for a particular class of plaintiffs, e.g., children or incompetent adults. Bills that address any of these issues are of interest to the industry.

In 1994, no bills unfavorably amending statutes of limitation were enacted.

2046641192

Source: https://www.industrydocuments.ucsf.edu/docs/qybk0000

Statutes of repose specify the time after a product is first sold (or first used) within which the manufacturer may be sued for injuries associated with its use. Some statutes identify a specific number of years, e.g., twelve, while others allow suits only for injuries that occur during the product's "useful safe life." In the latter case, the length of time is left for the jury to decide. In either case, such periods may expire before the injury occurs. Bills that would create or modify a statute of repose are of interest to the industry, even if they appear solely to a specific type of product, e.g., workplace machinery.

In 1994, no bills affecting statutes of repose were passed in any state.

Protective Orders and Confidential Agreements

In the last several years, the plaintiffs' bar has generated considerable press coverage about protective orders and confidential agreements. Protective orders are issued by the court and often apply to documents that one party receives from the other party during the "discovery" stage of litigation. Protective orders are also issued to prevent case settlement information from being made public. These are commonly called "sealed settlements."

Confidential agreements are private contracts entered into by the parties and are not formal court orders. They can apply to discovery documents and case settlements.

In the past several years, bills were introduced in a number of states that would have limited the availability of protective orders and confidential agreements. In other states, judicial committees considered proposed modifications to court rules to limit the use of protective orders. Any bills that would change the power of courts to control the distribution of documents provided by parties in the course of a lawsuit, or prevent confidential settlement agreements, are of interest to the industry. In addition, any information you obtain about efforts to encourage courts to change their rules is of interest to the industry.

Protective orders and confidential agreements serve several useful functions. Manufacturers sometimes ask courts to issue protective orders prohibiting distribution of discovered documents to anyone who is not a party to the lawsuit, based on concerns such as the protection of trade secrets and confidential commercial information. And since the majority of lawsuits are settled prior to trial, any proposal to restrict or bar the use of protective orders and confidential agreements, will only increase the number of cases on the already overburdened court dockets.

In 1994, many state legislatures rejected bills that would have limited the availability of protective orders and confidential agreements. In Washington state, the legislature amended the protective order law enacted in 1993 to make it less burdensome to businesses.

2046641193

Source: https://www.industrydocuments.ucsf.edu/docs/qybk0000

Contingency Fees

Attorneys typically charge a standard percentage fee of thirty to forty percent, and sometimes as much as fifty percent (in addition to expenses), to represent plaintiffs in personal injury lawsuits. Such arrangements often result in recoveries by lawyers that, when calculated on an hourly basis, far exceed a reasonable rate.

In recent years, legislation to modify the current contingency fee system has been introduced in several states. These proposals have sought to limit the percentage that can be charged by an attorney; create a sliding percentage schedule whereby an attorney would receive a progressively smaller percentage as the award amount increases; or require disclosure by the attorney of the actual number of hours spent on the matter, the actual fee charged and the effective hourly rate. Bills that address contingency fee agreements are of interest to the Industry.

Punitive Damages

The majority of states allow juries to award punitive damages to punish the defendant for egregious conduct. In recent years, both the number and size of punitive damages awards have increased. In response, many states have enacted bills that raise the standard or burden of proof for punitive damages awards, allow the defendant to ask for a separate trial on liability for, or the amount of, punitive damages, or limit the size of a punitive damages award. Bills that address any aspect of punitive damages are of interest to the industry.

In 1994, bills that would modify the laws governing punitive damages were considered in several states. In Texas, the legislature will likely consider punitive damages reform legislature when it convenes in January 1995.

Transfer of Litigation

The National Conference of Commissioners on Uniform State Laws has adopted a model Uniform Transfer of Litigation Act that, if enacted by states, would allow transfer of cases between courts of different states. The Act is intended to facilitate consolidation of cases in a single state court, but could be invoked to justify transfer any time the transferring and receiving courts agreed to transfer a case. The model Act does not address the question of what state's law would apply to the transferred case. The comments accompanying the model Act provide only limited guidance about factors that state courts might consider in selecting the law to apply.

Uniform Transfer of Litigation legislation was introduced and defeated in seven states during the past several years.

2046644194

Source: https://www.industrydocuments.ucsf.edu/docs/qybk0000